No. 90-978

In The

Supreme Court of the United States

October Term, 1990

MELODY PERKINS,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

MELODY PERKINS,

Petitioner,

v.

THOMAS S. SPIVEY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THOMAS S. SPIVEY IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit on which petitioner seeks a writ of certiorari is included in the Petition as Appendix C and is reported at 911 F.2d 22. The Findings of Fact, Conclusions

of Law and Order Granting Judgment for Defendant from which petitioner appealed to the Eighth Circuit is included in the Petition as Appendix E and is reported at 709 F. Supp. 1487. The order of the district court granting respondent Thomas S. Spivey ("Spivey") summary judgment is unreported and is included in the Petition as Appendix D. The order of the district court imposing sanctions against petitioner and her lead trial counsel is reported at 129 F.R.D. 655.

JURISDICTION

This Court has jurisdiction tc review the decision of the United States Court of Appeals for the Eighth Circuit under 28 U.S.C. § 1254(1). The Order of the Court of Appeals was entered on July 24, 1990 and petitioner's Motion for Rehearing or Rehearing En Banc was denied on August 29, 1990. The instant Petition for Writ of Certiorari was filed on November 27, 1990.

STATEMENT OF THE CASE

In the trial court, the petitioner pursued a consistent strategy of separating the disputes into different lawsuits in different courts: (i) on May 27, 1986 a suit was commenced in federal court on diversity jurisdiction against General Motors based on common law negligence; (ii) on May 29, 1986 a suit was filed in state court against Spivey alleging common law assault, battery and the tort of outrage; and (iii) on May 29, 1986 a Title VII lawsuit was filed in federal court against General Motors. Pet. App. at C8-11, 911 F.2d at 26-27. Petitioner pursued discovery separately, taking steps to assure that General Motors and Spivey were not apprised of the progress of discovery in the other cases. Pet. App. C12-13, 911 F.2d 27-28. Petitioner obtained a protec-

tive order in the state court action which specifically prohibited disclosure of information obtained through discovery. On October 16, 1987, less than 30 days prior to her motion to add Spivey as a party in the federal cases, petioner's counsel admonished Spivey's counsel to refrain from sharing information with General Motors which was obtained in state court discovery. She wrote:

> I wish to impress upon you the importance I attach to the Protective Order that we have entered into regarding taking of experts' depositions. Any violation of that order by you in conjunction with information received from my experts to GM, or to Mr. Spivey and then to GM, will require strong steps from the undersigned.

Eighteen months after the lawsuits were commenced, petitioner changed her strategy of separation and attempted to join Spivey as a defendant in the pending federal cases against General Motors. The trial court denied the motion as untimely and prejudicial. Pet. App. C42-44, 911 F.2d 34-35. After the denial of the joinder motion, petitioner dismissed the pending state court action against Spivey without prejudice, and refiled it in federal court alleging diversity jurisdiction.

The cornerstone of petitioner's argument concerning the alleged deprivation of her right to trial by jury is the speculative notion that she would have tried the *Perkins v. Spivey* matter first to a jury before the bench trial in the Title VII case. In fact, when faced with the prospect of a jury trial on her negligence claim in the *General Motors* case she (i) requested that the *General Motors* case be bifurcated to try the Title VII claim to the court first and (ii) later wrote the court stating she agreed to waive a jury trial on the negligence claim altogether. Resp. App. A2,4 and B2.

In fact, petitioner had a number of opportunities to try the basic factual issues to a jury; yet she elected to forego a jury determination at every juncture:

- She did not try the *Spivey* case in state court which was set in December 1987; rather, she dismissed that action without prejudice on the eve of trial.
- She did not request that the pending Title VII matter be stayed until *Perkins v. Spivey* could be tried.
- She did not seek consolidation of her claims against Spivey and General Motors in the federal lawsuits after the diversity claim against Spivey was brought in March, 1988

Of all these possibilities, most of which would have resulted in a jury trial, petitioner chose to try the Title VII claim to the Court first. She now pretends that she had nothing to do with that result.

In October of 1988, when petitioner still thought a jury trial was available in her suit against General Motors, she filed a motion for bifurcation of the issues in which she sought a bench trial on the issue of "whether Tom Spivey sexually harassed plaintiff." Resp. App. A2,4. In this motion she asked the court to separate the Title VII issues for trial, "which trial would *precede* the jury trial of plaintiff's claims for negligence" (emphasis added). The reasons for the motion were "in order to avoid prejudice, prevent a possible appeal, simplify the issues for the jury trial, and assist the court in ruling on the motions in limine with regard to the jury trial." Resp. App. A2.

In petitioner's suggestions in support of her motion for bifurcation she recognized the potential for collateral estoppel if her request was granted:

> If the court hears the Title VII matter, and decides the Title VII matter, prior to the jury being called, the questions for the jury and the evidence for the jury is necessarily curtailed. If the court has found that plaintiff was sexually harassed by Spivey and/or GM then the only questions for the jury are:
>
> (1) Was GM negligent in hiring or retaining employees that it knew or should have known could subject Perkins to sexual harassment?
>
> (2) Was GM negligent in failing to implement policies, or having implemented policies, failing to enforce those policies, to prevent Perkins from being sexually harassed?

Resp. App. A7.

Then she revisited the jury trial issue:

> If the jury trial poses so many legal questions, why have it if the Title VII case may dispose of the need for a jury trial either because of the decision of the court or because of potential settlement at the end?

Resp. App. at A8.

As petitioner requested, the Title VII case went to trial first in November, 1988. After 30 days of trial, the court ruled in favor of General Motors from the bench on January 11, 1989. The trial court's written decision was filed on April 10, 1989. Pet. App. C. Essentially, the district court found that the relationship between petitioner and Spivey was "welcomed" and consensual and that petitioner's account of the relationship was "the result of a fertile and twisted imagination." Petitioner has never asserted that the trial court's findings of fact are "clearly erroneous." Pet. App. C10-11, 911 F.2d at 27.

REASONS FOR DENYING THE WRIT

The Petition does not specify the basis on which certiorari is sought. Rule 10 contemplates that review on writ of certiorari will be granted only when there are special or important reasons therefore. Apparently, petitioner claims the decision of the Eighth Circuit conflicts with the decision of this Court in *Lytle v. Household Manufacturing, Inc.*, ____*U.S.*____, 110 S. Ct. 1331 (1990).

The Court of Appeals considered carefully and decided properly the *Lytle* issue. Moreover, the idiosyncratic strategies and procedural tangles pursued by petitioner's counsel in the prosecution of these lawsuits below seriously impairs the precedential value of a decision on the question posed in the Petition.

Rule 14.1(a) requires that the Question Presented be stated in the terms and circumstances of the case. The Court of Appeals did not consider or decide whether the bench tried Title VII judgment or the summary judgment on petitioner's common law damage claims should be set aside.

In the Court of Appeals, petitioner argued and the Court considered whether the actions of the district court denied petitioner's Seventh Amendment right to a trial by jury because:

1. the trial court did not grant her motion to recuse filed months after the court announced its bench ruling on the Title VII claim, Pet. App. C15, 911 F.2d at 28 n.6;

2. the trial court did not grant her motion for leave to join Spivey in the General Motors case eighteen months after the case was commenced, Pet. App. C16, 911 F.2d at 28 n.7; and

3. *Lytle v. Household Mfg.*, ____*U.S.*____, 110 S. Ct. 1331 (1990), prohibits the application of the doctrine of col-

lateral estoppel under *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979), in a separate action involving different parties, Pet. App. C47-49, 911 F.2d at 36 n.12.

The Court of Appeals did not hold, as petitioner's Question Presented implies, that the Title VII ruling remains unaffected by the result of the jury trial ordered on the negligence issue. It is premature to argue that the Title VII judgment is a nullity because the decision reached on the negligence issue may be decided in defendant's favor and may have no effect on that decision. Petitioner presents this Court with a question which is not ripe for adjudication.

The petitioner invited the district court to try the Title VII issues first in a bench trial. She actively induced the trial court to proceed in precisely the manner it did. Following thirty days of trial and dissatisfied with the result, petitioner claimed *for the first time* that her own trial maneuvers had deprived her of a jury trial.

In view of the unique procedural history of these cases, the Question Presented for Review might be well stated as:

> Whether a litigant who has actively sought a bench trial may reject the result if it is deemed unsatisfactory and get a second opportunity to try a case by claiming later that the Seventh Amendment required a jury trial?

A party may not complain on appeal of invited error or results for which he was responsible in the trial court. *Mercelis v. Wilson*, 235 U.S. 579, 582-83 (1915) (appelant cannot ask for reversal because of a ruling to which appellant assented at trial); *Mach v. Abbott Co.*, 136 F.2d 7, 10 (8th Cir.), *cert. denied* 320 U.S. 773 (1943); *Hudson v. Wylie*, 242 F.2d 435, 449 (9th Cir.), *cert. denied* 355 U.S. 828 (1957); *Platt v. United States*, 163 F.2d 165, 168 (10th Cir. 1947).

Petitioner pursued a trial strategy and invited the result. She filed separate suits. She obtained a protective order that prohibited respondents from sharing information or even attending depositions together. Her motion for joinder was filed 18 months after the initial filing of the suits and over two months after the deadline for joinder set out in the scheduling order. She did not join Spivey in the Title VII action. She brought *Perkins v. GM* to trial first, having dismissed the state *Perkins v. Spivey* case in order to avoid it being tried first.

On October 24, 1988, literally one week before the trial of petitioner's Title VII and negligence claims against GM was scheduled to begin, petitioner filed her motion to bifurcate the trial. She requested that the trial court separate the Title VII trial, "which trial would precede the jury trial of plaintiff's claims for negligence." Resp. App. at A2. She reasoned that "[I]f plaintiff looses (sic) the Title VII portion of this lawsuit, this suit may be at an end or at least ripe for appeal. ..." Resp. App. at A7 Petitioner got exactly what she requested—a bench trial on the Title VII claim first. Curiously, she now contends that following the exact procedure she suggested deprived her of her Constitutional right to a trial by jury.

The Supreme Court's decision in *Lytle* leaves its earlier decision in *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979) intact. The *Lytle* decision does not compel vacation of the Title VII judgment or the summary judgment in favor of Spivey in the instant case.

One who seeks to have a judgment of the trial court set aside because of an erroneous ruling carries the burden on appeal of showing that prejudice resulted from that error. *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943); *United States v. Seaboard Surety Co.*, 817 F.2d 956, 964 (2nd Cir.), *cert. denied*, 484 U.S. 855 (1987); *United States v. Huff*, 699 F.2d 1027,

1030 (10th Cir. 1983); *National Labor Relations Board v. Lee Office Equipment*, 572 F.2d 704, 708 (9th Cir. 1978); *Pulley v. United States*, 253 F.2d 796, 798 (8th Cir. 1958); *Kirk v. St. Joseph Stock Yards Co.*, 206 F.2d 283, 287 (8th Cir. 1953).

In order to overcome the presumption that the proceedings below were proper, the petitioner must carry the burden of establishing a legal error below which had a prejudicial effect on her substantive rights. Petitioner must show from the record that *but for* an erroneous ruling of the trial court, a jury trial would have preceded the bench trial on her Title VII claim. In *Lytle* it was conceded that but for the erroneous dismissal of the jury-triable claim, the case would have been resolved by a jury. *Lytle v. Household Manufacturing, Inc.*, _____ U.S. at _____, 110 S. Ct. at 1336. In view of petitioner's conduct in the court below, it is clear it was not the action of the trial court which was resulted in the bench trial.

CONCLUSION

The peitition for writ of certiorary should be denied.

Respectfully submitted,

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Counsel of Record for Respondent
Thomas S. Spivey

APPENDIX A

Plaintiff's Motion For Bifurcation
Of Issues And Suggestions
In Support Thereof

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MELODY PERKINS,

Plaintiff,

vs.

GENERAL MOTORS CORPORATION,

Defendant.

No. 86-0665-CV-W-9
No. 87-0048-CV-W-9

PLAINTIFF'S MOTION FOR BIFURCATION OF ISSUES
Filed October 24, 1988

Plaintiff pursuant to Rule 42 of the Federal Rules of Civil Procedure moves this court for its order separating out the following Title VII issues for trial, which trial would precede the jury trial of plaintiff's claims for negligence:

1. Whether Tom Spivey sexually harassed plaintiff;
2. Whether plaintiff was subjected to a hostile environment at GM.

As grounds for this motion plaintiff states that in order to avoid prejudice, prevent a possible appeal, simplify the issues for the jury trial, and assist the court in ruling on the motions in limine with regard to the jury trial this motion should be granted. For these reasons and the reasons set forth in plaintiff's suggestions in support of this motion filed contemporaneously herewith, plaintiff respectfully requests this court enter its order bifurcating the above issues.

WHEREFORE, plaintiff respectfully requests this court enter its order with regard to the bifurcation of the above issues.

Respectfully submitted,

THE LAW OFFICES OF
GWEN G. CARANCHINI

/S/

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing was filed with the clerk of the court and a copy hand-delivered to the chambers of the Honorable D. Brook Bartlett on October 24th, 1988 and copies handdelivered to Paul Scott Kelly, Gage & Tucker, 2345 Grand Avenue, Kansas City, Missouri this 23rd day of October, 1988.

/S/

Gwen G. Caranchini

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MELODY PERKINS,

Plaintiff,

vs.

GENERAL MOTORS CORPORATION,

Defendant.

No. 86-0665-CV-W-9
No. 87-0048-CV-W-9

PLAINTIFF'S SUGGESTIONS IN SUPPORT OF HER MOTION FOR BIFURCATION OF ISSUES

These cases were consolidated upon motion of GM for purposes of discovery and trial in February of 1987 by this court. The earlier filed case is the negligence claim of Perkins and the latter filed case is the Title VII claim. They were not filed simultaneously as the statute of limitations was running on the negligence claim and the Title VII claim had not been administratively processed as of the date of the filing of the negligence claim.

Plaintiff seeks not only to bifurcate the issues of whether Spivey sexually harassed plaintiff, and whether plaintiff was subjected to a hostile environment at GM, but have these matters tried to the court prior to the negligence claim. The reasons for this are as follows:

1. The court at the October 21 pretrial indicated it would not seek an advisory opinion from the jury on the issues of whether Spivey sexually harassed plaintiff, and whether plaintiff was subjected to a hostile environment at GM. If the jury does not decide these issues then quite possibly there could be an inconsistency in verdict which could lead to an appeal that might occur; i.e. the court might find Perkins was not sexually harassed or was not subjected to a hostile environment and the jury might find GM was negligent. The question arises then—can GM be accused of negligence regarding something which did not happen? Can GM be negligent for retaining Spivey when Spivey has been found not to have sexually harassed Perkins[1]? Or if Perkins was not subjected to a hostile environment at GM can GM be accused of negligence in failing to prevent that result?[2]

2. The Court has readily admitted it needs to be educated in the facts of this lawsuit. In order to rule on many of the Motions in Limine which are directed to the jury trial this court must understand the facts of this case. By hearing the Title VII portion of this lawsuit in toto rather than piecemeal, including the testimony of the experts, outside the hearing of the jury, the court will be afforded the opportunity to better determine what facts or opinions should be heard in the presence of the jury. This would

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1 This is not to say that the sole issue of negligent retention has to deal with the retention of Tom Spivey.

2 Once again this is not to say that the sexual harassment of Perkins is the sole relevant issue in the negligence claim.

substantially reduce the chance for prejudicial error[3] in the jury trial of evidence being admitted which should not have been admitted to the issues to be tried in that case.

3. Likewise, the court may after hearing the testimony of the plaintiff and her experts, and defendant's experts be able to decide whether assumption of the risk is a defense to the negligence claim.[4] If in fact it is, then the necessity for a lengthy and expensive jury trial would be negated.

4. Other Considerations

a. Trial time.

No doubt the defendant will claim this will unduly lengthen the trial overall. However, GM has the resources much more so than plaintiff to sustain such an increase in trial time--if an increase occurs. The latter is the real question here. If the court hears the Title VII matters in toto first, rather than piecemeal, the hearing of testimony in the presence and outside the presence of the jury will be lessened. Just the absence of the comings and goings of that pro-

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3. The issue of prejudicial error in the jury trial of this case is extremely high given the leading edge of the case law in this area,the theories, and the emotional issues. By pretrying the Title VII matter the court could negate many of the grounds for a Judgment notwithstanding the Verdict, a Motion for New Trial or an appeal on prejudicial error. Likewise, the chance for mistrial on any of the prejudicial grounds might be substantially reduced.

4. We refer the court to pages 7 and 8 of its order denying GM's Motion for Summary Judgment on the issue of assumption of the risk. The Court indicated that on the record it could not determine as a matter of law whether the risk (sexual harassment) was not a normal incident to a motor vehicle assembly plant or an extraordinary risk. Likewise, the court indicated that on the record presented it could not determine whether the risk of psychological injury from sexual harassment is a normal incident to working a motor vehicle assembly plant.

cess alone coupled with shortened voir dires of witnesses could substantially shorten the jury trial.

b. The issues left for the jury

If the court hears the Title VII matter, and decides the Title VII matter, prior to the jury being called, the questions for the jury and the evidence for the jury is necessarily curtailed. If the court has found that plaintiff was sexually harassed by Spivey and/or GM then the only questions for the jury are:[5]

(1) Was GM negligent in hiring or retaining employees that it knew or should have known could subject Perkins to sexual harassment?[6]

(2) Was GM negligent in failing to implement policies, or having implemented policies, failing to enforce those policies, to prevent Perkins from being sexually harassed?[7]

c. Estimated trial time

Plaintiff estimates each trial at approximately three weeks. Both will be concluded in the time allocated by the court. The duplication of some testimony which will increase the potential trial time will be reduced by the focusing on the issues for each factfinder and less shuffling in and out of the courtroom

d. Lessening the chance for appeal and finally settling this matter for both parties.

Quite frankly if plaintiff looses (sic) the Title VII portion of this lawsuit this suit may be at an end or at least ripe for appeal at that stage.[8] If plaintiff wins, however, the chances

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5 This presupposes that the court has as a matter of law determined that there is a commonlaw duty owed the plaintiff by GM.

6 Once again can a jury decide this issue without necessarily deciding whether Perkins was in fact sexually harassed which invades the province of the court in deciding the Title VII matters.

7 Once again, can a jury find this without finding Perkins was in fact sexually harassed?

8 There would certainly be a question whether plaintiff could proceed on her negligence claim absent a finding of sexual harassment by the court.

for settlement of the suit are certainly greater as GM would face a trial before a jury which would know the Court has found for the plaintiff in terms of being sexually harassed. In other words both parties have something to loose (sic) and both parties have something from such a bifurcation.

e. Chance for mistrial lessened if the trial is shortened.

If the trial is shortened there is less chance that a mistrial will occur for lack of sufficient jurors to decide the case. A three week jury trial would certainly have the chance of having at least five jurors present at the end of the trial. A six or more week trial would not.

A six week jury trial is also more likely fraught with the potential for reversible error if nothing else resulting from the stress of all lawyers, the Court and the parties' witnesses.

5. Reasons why bifurcation not sought earlier.

a. The last several weeks interchanges between the court and the lawyers both in telephone conferences and court conferences have brought to light innumerable legal problems particularly in the jury tried portion of this case in terms of legal theories and the testimony to be allowed in the hearing of the jury.

If the jury trial poses so many legal questions, why have it if the Title VII case may dispose of the need for a jury trial either because of the decision of the court or because of potential settlement at the end?

As to the issue of what will be heard in or outside the presence of the jury, it is interesting that the parties have flip flopped on their opinions as to what should be heard in the presence of the jury. About two weeks ago the court raised the question in a telephone conference as to the fact it thought there should be a division as to what was and was not heard by the jury. GM agreed in that telephone conversation and

Perkins took exception to that. Now it is GM who claims the testimony is identical in both cases and Perkins who believes the testimony is substantially different.

b. As the court has candidly admitted and plaintiff's counsel will likewise admit, its never too late to change your mind after being educated. After the telephone conferences, meetings, and recent filings of the parties, it is clear to plaintiff's counsel that drastic simplification of the issues would serve all the parties and the judicial system (most certainly including the court of apppeals).

Finally, plaintiff would ask this court to rule on this as quickly as possible because it most certainly drastically alters the manner in which plaintiff was planning on trying her case. It would also necessitate the court informing the jurors not to appear.

Respectfully submitted,
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing was filed with the clerk of the court and a copy handdelivered to the chambers of the Honorable D. Brook Bartlett on October 24th, 1988 and copies handdelivered to Paul Scott Kelly, Gage & Tucker, 2345 Grand Avenue, Kansas City, Missouri this 23rd day of October, 1988

/S/

Gwen G. Caranchini

APPENDIX B

October 25, 1988 Letter From Gwen
Caranchini To Paul Scott Kelley
and John J. Yates

[Letterhead of Gwen G. Caranchini]

October 25, 1988

BY HAND

Paul Scott Kelly, Esq.
John J. Yates, Esq.
Gage & Tucker
Post Office Box 418200
Kansas City, Missouri 64141

Re: Perkins v. General Motors
Our File No. 4686413

Dear Scott and Jack:

Enclosed please find my "short list". You will note that I have just circled the "short list" names on the file stamped copy of our witness list. We do not concede we may have to call more than the "circled" names.

As I also indicated in our telephone conversation last night, my client has agreed to waive a trial by jury.

Sincerely,

THE LAW OFFICES OF
GWEN G. CARANCHINI

/S/

Gwen G. Caranchini

GGC: wg
Enclosure

cc: The Honorable D. Brook Bartlett (with enclosure)